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No. 218

In the Supreme Court of the United States

OCTOBER TERM, 1950

UNITED STATES OF AMERICA, PETITIONER

v.

YELLOW CAB COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinions of the United States District Court for the Eastern District of Pennsylvania on the pleadings and proof (R. 12–13) and on the motion of the United States to set aside the verdict (R. 14–16) are not reported. The opinion of the United States Court of Appeals for the Third Circuit (R. 35–45) is reported at 181 F. 2d 967.

JURISDICTION

The judgments of the Court of Appeals were entered on April 27, 1950 (R. 45, 46). The petition for a writ of certiorari was filed on July 24, 1950, and was granted on October 9, 1950 (R. 51). The

jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Tort Claims Act authorizes impleading the United States as a third-party defendant.

2. Whether the Tort Claims Act subjects the United States to liability for contribution to a joint tort-feasor.

STATUTE AND RULE INVOLVED

Pertinent portions of the Federal Tort Claims Act, in its original form (60 Stat. 842, 28 U. S. C., 1946 ed., 931 *et seq.*),[1] and Rule 14 (a) of the Federal Rules of Civil Procedure are set forth in the Appendix, *infra,* pp. 56–60.

STATEMENT

These two actions arose out of a collision on December 1, 1946, at a street intersection in Phila-

[1] Under the revision of the Judicial Code (Act of June 25, 1948, 62 Stat. 869), the provisions of the Tort Claims Act now appear in Sections 1291, 1346 (b), 1402, 1504, 2110, 2401, 2402, 2411, 2412, and 2671–2680 of Title 28, United States Code. Since the accident involved in this litigation occurred before the effective date (September 1, 1948, see Section 38 of the Act of June 25, 1948, 62 Stat. 992) of the new Judicial Code, we assume with the court below (R. 38) that the original formulation of the Tort Claims Act is applicable here. As indicated below, however (see note 10, *infra*, pp. 30–31), we believe that the slight differences in language between the original Act and the sections of Title 28 which reenact it are immaterial to the questions presented herein.

delphia, Pennsylvania, between a taxicab, owned by respondent and driven by its employee, and a United States mail truck driven by a government employee (R. 3–4, 5, 8–9, 10, 18, 20, 24, 25). The original plaintiffs were passengers in the taxicab at the time of the collision. Predicating federal jurisdiction upon diversity of citizenship and amounts in controversy exceeding $3,000, they brought suit against respondent in the United States District Court for the Eastern District of Pennsylvania, alleging that they had been injured as a result of the negligence of respondent's driver (R. 3, 18). Respondent sought and obtained leave to implead the United States as a third-party defendant in both actions, claiming that the United States was or might be liable to it for all or part of the plaintiffs' claim (R. 4, 5, 19, 20).

Following denial of motions by the Government to dismiss the third-party complaints on the ground that they asserted derivative claims unauthorized by the Tort Claims Act, the cases were consolidated and tried to the court without a jury (R. 9, 24, 25, 12, 14). The court concluded that both the taxicab driver and the mail truck driver had been negligent, awarded judgments totalling $7,800 in favor of the plaintiffs against respondent, and entered judgments for one-half of this amount, $3,900, in favor of respondent against the United States (R. 12–13, 25–26). The Government, contending that the court lacked jurisdiction over the

United States as third-party defendant and that the third-party complaints failed to state claims upon which relief could be granted, moved to have the judgments set aside (R. 13–14). This motion was denied, the court holding that the Tort Claims Act authorized both joinder of the United States as a third-party defendant and the assertion against the United States by a joint tortfeasor of the substantive right to contribution recognized by state law (R. 14–16).

On appeal, the judgments of the district court were affirmed (R. 45, 46). The court below held, first, that while there is "room for doubt," the Tort Claims Act "must be construed to have authorized suits against the United States not only when the United States was the sole or single defendant but also when the United States was joined with another defendant or defendants" (R. 43). Second, the court concluded that the waiver of immunity in Section 410 (a) of the Tort Claims Act to suits "on account of personal injury" was broad enough to include consent to suits for contribution (R. 43–45).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the United States may be impleaded as a third-party defendant under the Tort Claims Act.

2. In holding that the United States is subject to liability for contribution under that Act.

3. In affirming the judgments of the District Court.

SUMMARY OF ARGUMENT

In permitting the joinder of the United States as a third-party defendant and in holding the United States liable for contribution to a joint tortfeasor, the court below has found a congressional authorization which is nowhere expressed in the Tort Claims Act and which is in fact inconsistent with its terms and history. We submit, therefore, that the court erred in its decision on both of the questions presented here and that either or both of these errors requires reversal of the judgments below.

I

The legislative history of the Tort Claims Act shows clearly the intention of Congress to withhold the consent necessary before the United States may be joined with a private defendant. Congress created in the Act a jurisdiction essentially the same as that exercised by the district courts under the Tucker Act—a jurisdiction which, this Court has held, does not permit joinder of the United States with a private defendant.

Not only does the Tort Claims Act contain no express consent to the joinder of the United States with private defendants, but its scheme is at several points inconsistent with the allowance of such joinder. Thus, like the Tucker Act, the present

Act provides for trials without a jury, a provision appropriate to litigation in which the United States was intended to be a sole defendant. The attempt to combine jury trials between private litigants with non-jury trials against the United States would create problems for the resolution of which the Act offers no guidance because they are problems which were unforeseen and unintended by Congress. The provision for permissive review by the Court of Claims of judgments under the Act—for review, that is, by a tribunal which is peculiarly and exclusively concerned with the assertion of claims against the United States—is further evidence that the Government was meant to be a sole defendant. Finally, the Act's venue provision, simply worded and easily administered where the United States is a sole and original defendant, becomes a source of difficulty under the view that the United States may be joined as a third-party defendant.

Because the third-party suits against the United States exceeded its jurisdiction, the district court should have dismissed the third-party complaints. Severance of the third-party suits—apart from the fact that respondent's claims for contribution did not accrue until its liability to the injured plaintiffs was established—could not cure the court's lack of power to order the joinder of the United States.

II

If our conclusion on the question of joinder is correct, not only is it sufficient in itself to require reversal of the judgments below, but it also weighs heavily against the contention that the United States is subjected by the Tort Claims Act to liability for contribution. For a statute permitting suits for contribution, but forbidding joinder, would impose a pointlessly technical requirement that closely related or identical issues be litigated separately.

Apart from the question of joinder, however, congressional consent to the assertion against the United States of a substantative right of contribution is not conferred by the Tort Claims Act. As its title announces and as its legislative history repeatedly demonstrates, the Act was designed to permit suits on tort claims and its provisions deal only with the problems presented by such claims. A suit for contribution does not assert a tort claim. The right to contribution, where it exists at all, is independent and quasi-contractual in nature, a right created by decision or statute as a mode of distributing loss among tortfeasors. Because it is different and separate from the right of the tort claimant, the right to contribution may be asserted in cases where a tort claim would be barred by a statute of limitations, a release, or a prior judgment. The Tort Claims Act neither

contemplates nor permits these results, which are inconsistent with a number of its provisions.

Nor is the inconsistency cured by anything in the legislative history of the Act. Though a single House Report, published more than four years prior to passage of the actual statute, contained a passage which might superficially be construed to suggest that contribution was to be authorized by the bill then under consideration, such a construction becomes untenable upon closer examination. In any event, this single remark in a long legislative history, made in an earlier Congress and concerned with a bill which never became law, cannot alter the result required by the later and different bill which became the Tort Claims Act.

Equally irrelevant to the present problem is the fact that subrogees may sue under the Tort Claims Act. A subrogee asserts no independent right like the right of contribution, but stands in the shoes of the tort claimant, suing upon the very tort claim which the latter might have brought, subject to the same defenses and limitations.

Finally, the fact that contribution may be obtained from the Government under the Suits in Admiralty and Public Vessels Act is of no aid to respondent here. These statutes waive the Government's immunity to any type of admiralty claim—a waiver obviously broad enough to permit claims for contribution. The Tort Claims Act, on

the other hand, does not authorize civil claims generally, but only tort claims.

ARGUMENT

In posing the issues before this Court, it may be helpful to state briefly the two basic considerations which mark both the starting-points and the limits of the present controversy. First, it is agreed that on comparable facts a private person might have been joined by respondent as a third-party defendant (Fed. R. Civ. P. 14 (a), *infra*, p. 60) and might have been held liable for contribution under Pennsylvania Law (12 Pa. Stat. (Purdon) § 2081). Second, however, it is settled that, absent the consent of Congress, the sovereign immunity of the United States makes unavailable against the Government both the "procedural" weapon of joinder and the substantive right of contribution. The only questions, therefore, are whether Congress has authorized either joinder or contribution. To prevail, respondent must show that both have been authorized.

For the requisite congressional consent respondent has invoked the Federal Tort Claims Act. But that Act contains no express authorization for either joinder or contribution and, far from implying such authorization, its terms, its structure, and its history point decisively the other way. We shall urge, therefore, that the court below has erred in its rulings on each of the two questions presented herein and that either

of these errors constitutes an independent ground requiring reversal of the judgment below.

I

THE UNITED STATES MAY NOT BE JOINED WITH ANOTHER DEFENDANT IN A SUIT UNDER THE TORT CLAIMS ACT

A. *Congress intended to withhold the consent required for joinder of the United States with another defendant*

The decision in *United States* v. *Sherwood,* 312 U. S. 584, settled the rule, which had theretofore been announced in lower federal courts (see *infra,* p. 12), that the consent conferred by the Tucker Act to suits against the United States does not authorize suits in which the United States is joined with another defendant. Under that decision, it is clear, such an ordinarily "procedural" question as joinder becomes, in suits against the United States, a matter "of jurisdiction whose limits are marked by the Government's consent to be sued." 312 U. S. at 591. Congressional authorization of suits against the United States on a designated class of claims is of itself insufficient to embroil the United States "in litigations in which issues between the plaintiff and third persons are to be adjudicated." *Id.* at 589, 591–592.

In its reports on the bills which ultimately became the Federal Tort Claims Act, Congress

demonstrated in unmistakable terms both its familiarity with the *Sherwood* case and its intention that the rule of that case was to apply under the Act—that joinder of the United States with other defendants in tort claims suits was not to be permitted.[2] The Report of the House Judiciary Committee on H. R. 181, 79th Cong., 1st Sess., the bill which, essentially unchanged, became the Tort Claims Act (see S. Rep. No. 1400, 79th Cong., 2d Sess., p. 30; *Brooks* v. *United States*, 337 U. S. 49, 52), declared (H. Rep. No. 1287, 79th Cong., 1st Sess., p. 5):

> It is intended that the district courts in exercising jurisdiction under this title shall

[2] Strictly speaking, the word "joinder" describes the situation where a plaintiff sues two or more defendants together, while "impleader" is the technically correct description of the procedural device whereby a third-party suit is commenced. For present purposes, however, the practical effects of the two procedures are substantially identical, and we use the term "joinder" to describe both—following the usage of the court below and of the Court of Appeals for the District of Columbia Circuit in *Capital Transit Co.* v. *United States*, No. 204. If the United States and a private defendant are joined by the plaintiff, they may assert cross-claims against each other. Fed. R. Civ. P. 13(g). If the joinder results from a third-party complaint, the original plaintiff and third-party defendant may assert claims against each other. Fed. R. Civ. P. 14 (a), *infra*, p. 60. Thus, however the joinder is initially accomplished, it tends ultimately to litigation in the same suit of (1) claims between original plaintiff and private defendant, (2) claims between original plaintiff and United States, and (3) claims between private defendant and United States.

> exercise essentially the same type of jurisdiction as district courts exercise concurrently with the Court of Claims of the United States under the Tucker Act (act of March 3, 1887, 24 Stat. 505; 28 U. S. C. sec. 41 (20)). *The bill therefore does not permit any person to be joined as a defendant with the United States* and does not lift the immunity of the United States from tort actions except as jurisdiction is specifically conferred upon the district courts by this bill. (See *United States* v. *Sherwood,* 312 U. S. 584 (1941); *Lynn* v. *United States,* 110 F. (2d) 586, 588 (C. C. A. 5th, 1940); *Waite* v. *United States,* 57 C. Cls. 546 (1922); *Jackson* v. *United States,* 27 C. Cls. 74, 84 (1891). *The phrase "as a court of claims" in section 301 of the Senate bill was deleted as surplusage.* [Italics added.]

The foregoing language was familiar to the Senate Committee dealing with the Tort Claims bill in its final form, as evidenced by that Committee's reference to, and extensive quotation from, the Report in which it appeared. S. Rep. No. 1400, 79th Cong., 2d Sess., p. 30.[3] And the

[3] The intention to forbid joinder was not expressly reiterated in S. Rep. No. 1400, 79th Cong., 2d Sess. This report dealt, however, with S. 2177 which became the omnibus Legislative Reorganization Act of 1946 and of which the Tort Claims Act comprised only one of (then) seven titles (as passed, the Reorganization Act contained six titles). In the circumstances, the failure to detail again the already crystallized view that joinder was to be imper-

identical language had appeared in a report on an earlier bill (H. Rep. No. 2245, 77th Cong., 2d Sess., p. 9), a report which repeated, in a connection to be discussed below (see *infra*, pp. 46–47, 50), the Committee's insistence that "no person may be joined with the United States as defendant" (p. 12).

These expressions of congressional intent are too clearly and precisely applicable to the problem at hand to require extensive elaboration here. Congress knew that, unless it consented to joinder of the United States with other defendants in suits under the Tort Claims Act, such joinder would be forbidden. Knowing this, it declared that the statutory language invoked by respondent withholds the necessary consent. It is against this background that the Act must be examined to determine whether Congress has unwittingly authorized a result which it insistently declared was to be avoided.

B. *The Act contains no express consent to joinder and its scheme is inconsistent with the presence of defendants other than the United States in the actions it authorizes*

The provisions of the Act nowhere express the consent to joinder of the United States with

missible hardly warrants the inference that the view had been tacitly abandoned. On the other hand, the recognition in S. Rep. No. 1400 of the substantial identity between H. R. 181 and the tort claims title of S. 2177 and the reference back to the House Report on H. R. 181 are plainly indicative of an unchanged legislative intent.

another defendant which is shown by the *Sherwood* decision to be required before any such joinder could be permitted. *Drummond* v. *United States*, 78 F. Supp. 730 (E. D. Va.); *Uarte* v. *United States*, 7 F. R. D. 705 (S. D. Cal.). Quite properly, we believe, the court below (R. 41) has rejected the notion that joinder was authorized by the provision in the Act (Section 411, 60 Stat. 844, *infra*, p. 58) making applicable to actions thereunder "the forms of process, writs, pleadings, and motions, and the practice and procedure" prescribed in the Federal Rules of Civil Procedure.[4] For the suggestion that these rules of *procedure* can serve to enlarge the limits of the jurisdiction created by the consent of Congress is squarely refuted by the decision in *United States* v. *Sherwood*, *supra*. See 312 U. S. at 589-590, 591. Indeed, the Rules themselves (see Rule 82) expressly disclaim any purpose to affect jurisdiction.[5]

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[4] This provision was omitted as unnecessary when the sections of the Act were distributed through Title 28 of the U. S. Code. Without this provision, the Federal Rules apply, as they do to actions under the Tucker Act (cf. *United States* v. *Sherwood*, *supra*, at 589) and to all other civil actions. See S. Rep. No. 1559, 80th Cong., 2d Sess., pp. 11-12.

[5] The committee reports we have cited as showing the impermissibility of joinder were addressed to bills which contained provisions similar to that in Section 411 making the Federal Rules applicable. These reports, immediately after stating that joinder was to be prohibited, referred to the provisions making the Federal Rules applicable, thus unmistakably indicating that those were not regarded as authorizing joinder. See H. Rep. No. 2245, 77th Cong., 2d Sess., p. 9; H. Rep. No. 1287, 79th Cong., 1st Sess., p. 5.

Nor is respondent's position supported by the provision in Section 410 (a) (60 Stat. 843, now 28 U. S. C. 2674) that, with respect to claims for which it assumed liability under the Act, the United States consented to be "liable * * * in the same manner and to the same extent as a private individual under like circumstances * * *." On its face this provision deals with the *liability* the Government assumes, and not the nature of the litigation to which the Government consents. Moreover, the language in question, however it might be construed if it had no context, cannot fairly or intelligibly be read alone. It bears repetition, first of all, that this very language was contained in the bills to which the committee reports referred when they declared flatly that joinder was to be impermissible. Even more significantly, the directive that the United States was to be "liable * * * in the same manner and to the same extent as a private individual" is to be read, as the sentence in which it appears dictates, "[s]ubject to the provisions" of the Act as a whole. And when the language is so read, it clearly cannot be viewed as authorizing joinder of the United States with other defendants. For the Act as a whole created a jurisdiction like that described in the committee reports—of "essentially the same type * * * as district courts exercise concurrently with the Court of Claims * * * under the Tucker

Act"—a jurisdiction neither contemplating nor consistent with the joinder of the United States with other defendants.

1. Congress provided that suits under the Act were to be tried by the court "sitting without a jury." Section 410 (a), 60 Stat. 843, now 28 U. S. C. 2402. Private parties, on the other hand, have the commonly exercised right to a jury trial.[6] Apart from the difficulties, presently to be discussed, of combining jury trials between private litigants with non-jury trials against the United States, the provision for trial without a jury evidences a congressional understanding that, as under the Tucker Act, the United States was to be a sole defendant in suits under the Tort Claims Act.[7] Moreover, the very failure of Congress to make provision for the mingling of jury with non-jury trials or to express anywhere in the Act's long history an awareness that such a situation might arise supports the conclusion that Congress carried out its express intention to preclude joinder.

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[6] In the present suits, there appears to have been no demand for a jury trial, and the original actions and third-party actions were tried together without a jury (R. 14). In *Capital Transit Co.* v. *United States*, No. 204 (of which see R. 3), the injured plaintiff demanded a jury trial of his suit against Capital Transit.

[7] "The trial will be without a jury as is now the case in suits under the Tucker Act," S. Rep. No. 1400, 79th Cong. 2nd Sess., p. 32.

And this conclusion is reinforced when we consider some of the difficulties of reconciling the ban against jury trials in the Tort Claims Act with the holding below that the United States may be impleaded as a third-party defendant. In defending the claim against itself the United States as a third-party defendant is entitled to interpose defenses to the plaintiff's claim against the third-party plaintiff. Fed. R. Civ. P. 14 (a), *infra*, p. 60. The Act requires that any issues raised by these defenses be tried to the court without a jury. But the plaintiff, who need not and frequently will not assert any claim against the third-party defendant,[8] has the right to have his claim against the third-party plaintiff (the original defendant) tried by a jury. The Act affords no clue to a resolution of the resulting impasse. The suggestion of the court below (R. 39) that the jury problem is solved by having judge and jury make separate findings is clearly inadequate since it would invite the incongruous possibility of divergent determinations on identical issues of fact and liability.

Because the third-party plaintiff's liability to the plaintiff is an essential element of the claim for contribution, such divergent findings by judge and jury would result in obvious embarrassment.

[8] Neither in this case nor in *Capital Transit Co.* v. *United States*, No. 204, did the original plaintiffs amend their complaints so as to assert claims upon the United States as tortfeasor.

Thus, the jury may award a verdict against the third-party plaintiff, concluding from the evidence that the plaintiff was free of contributory negligence. The court, although deeming the evidence sufficient to support the verdict, may nevertheless, on its own view of the evidence, conclude that the plaintiff was contributorily negligent. Ordinarily, the party from whom contribution is claimed is bound by the adjudication of the claimant's liability to the injured person. *Knell* v. *Feltman*, 174 F. 2d 662, 665 (C. A. D. C.); *cf.* Gregory, *Procedural Aspects of Securing Tort Contribution in the Injured Plaintiff's Action*, 47 Harv. L. Rev. 209, 214 (1933). If this rule is applied, however, it results in a judgment against the United States predicated in part on a jury verdict, contrary to the Act's command. If, on the other hand, the court's finding controls as to the liability of the United States, the anomalous result is reached of denying recovery to the third-party plaintiff on the ground that he was not liable, despite the fact that he has been held liable, to the original plaintiff. Neither solution seems satisfactory; neither, we think, was ever intended to be necessary.

Potential difficulties could be multiplied—for example, the possibility of divergent findings on the question of damages or the differing consequences on appeal of improperly admitted evidence depending on whether the facts are tried

by judge or jury. See *McCaskill Co.* v. *United States,* 216 U. S. 504, 516–517; *Thompson* v. *Carley,* 140 F. 2d 656, 660 (C. A. 8). The complete omission, in the long history of the Act before Congress, of any mention of these difficulties, much less any attempt to guide the courts in their resolution, confirms the conclusion that in providing for trial without a jury, Congress contemplated a jurisdiction, like that under the Tucker Act, limited to cases in which the United States is the sole defendant.

2. Section 412 of the Act, 60 Stat. 844, now 28 U. S. C. 1504, provides for a review of judgments in cases under the Act by the Court of Claims upon consent of all the appellees. The notion of litigation in the Court of Claims between private litigants or of Court of Claims review of jury findings—both possible if joinder is permissible under the Act—led Judge Bryan, in *Drummond* v. *United States,* 78 F. Supp. 730, 732 (E. D. Va.), to make the following observations in the course of an opinion refusing to allow joinder:

> * * * There will be but one final judgment even if joinder is permitted. It may be entered both on a jury's verdict as to the individual defendants and on the court's finding in respect to the United States. The Court of Claims, if its review were sought, would then be passing upon a jury case, a function foreign to its character. Moreover, the Court of Claims would thus

> have before it a claim by one individual against another, which equally demonstrates that the Act never envisaged a defendant other than the United States. To magnify the anomaly, suppose the United States did not appeal, or was successful in the lower court while the other defendants were not, and thus put before the Court of Claims only private litigants.

It is, in short, scarcely conceivable that Congress would have chosen the Court of Claims as an appellate court had it intended that suits under the Act would involve defendants other than the United States. For the Court of Claims is peculiarly and exclusively a forum for the assertion of claims against the United States, a legislative tribunal to which a role was appropriately given in fulfilling "the purpose of Congress to relieve itself [by the Tort Claims Act] of consideration of private claims * * *." *United States* v. *Aetna Surety Co.*, 338 U. S. 366, 380. It seems unlikely that Congress would have conferred upon that Court the additional function of reviewing private litigation without discussion or explanation of so unprecedented a step. Cf. *United States* v. *Jones*, 336 U. S. 641, 651–652. Some comment, at the very least, would undoubtedly have been provoked by the constitutional doubts implicit in the possibility of review by the Court of Claims of jury findings. Cf. Hearings before the Committee on the Judiciary, House of Representatives, 77th Cong., 2d Sess., on H. R. 5373 and H. R. 6463, pp.

21–23; opinion below, R. 40. But the reports and debates are silent on such problems also—a further indication that Congress intended to create only the same type of jurisdiction as that existing under the Tucker Act. Cf. *National Ins. Co.* v. *Tidewater Co.*, 337 U. S. 582, 593–594.

3. Section 410 (a) of the Tort Claims Act, 60 Stat. 843, now 28 U. S. C. 1402 (b), provides that suits thereunder may be brought only in "the district wherein the plaintiff is resident or wherein the act or omission complained of occurred * * *." Here again, joinder of the United States as a third-party defendant may be seen to have been beyond the legislative intent. If, as we think is clearly the case, the Act was intended to provide for suits between tort claimants on the one hand and the United States as sole defendant on the other, the venue provision is simple and obvious in its purpose. It becomes perplexing, however, if joinder is thought to be permissible.

Ordinarily, where a tort action has been commenced between private litigants, it may be brought in the district where the plaintiff resides, where the defendant resides (see 28 U. S. C. 1391 (a)), or—since defects of venue may be waived—in neither. The district in which the action is heard may or may not happen to be the one in which the allegedly tortious acts occurred. Where an attempt is made to bring a third-party

suit within the venue provision of the Tort Claims Act, the question inevitably arises whether Congress intended the applicable district of residence to be that of the original plaintiff or that of the third-party plaintiff. However this question might be answered by the courts, the presently significant point is that it is not answered in the Act. In requiring suit to be brought either where the wrong occurred or in "the district where *the plaintiff* is resident," Congress contemplated only a plaintiff with a tort claim, not a third-party plaintiff who, for wholly fortuitous reasons, might or might not be engaged in defending a suit in the district of his residence.

C. *Because it lacked jurisdiction to implead the United States, the District Court should have dismissed the third party complaints*

For the foregoing reasons we think it clear that the Tort Claims Act does not authorize joinder of the United States with other defendants. It may be suggested, however, that although such joinder in a single action is prohibited, it would have been permissible for the court below to sever the proceedings, and to treat the issues raised by the third-party complaints as independent actions. We believe that any such suggestion would be untenable.

As we have shown (*supra*, p. 10), an incorrect decision allowing joinder of the United States

is not merely a procedural error, but constitutes the assumption of a non-existent jurisdiction. Accordingly, where an original plaintiff sought to join the United States with another defendant, it has been held, in effect, that since the court can acquire no jurisdiction over the United States as a co-defendant, it cannot order a severance but must dismiss the action against the United States for want of jurisdiction. *Sappington* v. *Barrett,* 182 F. 2d 102 (C. A. D. C.). But cf. *Prechtl* v. *United States,* 84 F. Supp. 889 (W. D. N. Y.); *Drummond* v. *United States,* 78 F. Supp. 730 (E. D. Va.); *Uarte* v. *United States,* 7 F. R. D. 705 (S. D. Cal.). *A fortiori* it seems clear that an attempt to implead the United States as a third-party defendant must, if the Tort Claims Act does not authorize this procedure, be blocked at its very inception.

In the first place, where a defendant seeks to join the United States as a third-party defendant despite the fact that the United States has not consented to such joinder, it is the very order allowing the third-party complaint which is beyond the court's jurisdiction. No subsequent order of severance can cure this fatal lack of power at the inception of the third-party action. It may be that the technically correct procedure for attacking an improper attempt to commence a third-party suit is a motion to vacate the order

granting leave to bring in the additional defendant. See 3 Moore, *Federal Practice* (2d ed., 1948) 447–448, and cases there collected, footnote 22. But, regardless of the device employed to raise the point, the court cannot issue an order beyond its jurisdiction to implead the United States and then, never having acquired jurisdiction over the United States, create such jurisdiction by ordering a severance.

Moreover, where, as here, it seeks contribution *in the event* the third-party plaintiff (respondent) is held liable to the original plaintiffs, the third-party complaint states no claim which is capable of being separated and maintained as an independent suit. Federal Rule 14 (a) provides for a third-party action by a defendant against a party "who is or may be liable to him for all or part of the plaintiff's claim against him." Respondent sought to implead the United States, not because the United States *was* liable to it, but only because it might be. Until or unless respondent was held liable to the plaintiffs, it could have no ripened claim for contribution. See *infra*, pp. 34–35. Because Rule 14 (a) contains the words "may be," it permits an "acceleration of liability," but only in the sense that a potential claim may be put in litigation before it would sustain an independent suit. See *Jeub* v. *B/G Foods*, 2 F. R. D. 238, 240 (D. Minn.); 3 Moore, *Federal Practice* (2d ed., 1948) 419–421. It is only because of these

words and within the framework of Rule 14 (a) that such a claim could have been asserted by respondent before its own liability had been determined.

Obviously, however, respondent could not have maintained at the outset of this litigation an independent suit for contribution (assuming, as we have solely for purposes of discussion to this point, that the United States has consented to such suits). Therefore, since Congress has not consented in the Tort Claims Act to the use against the United States of the machinery of Rule 14 (a), the district court should have dismissed the third-party complaint.

II

THE UNITED STATES HAS NOT CONSENTED IN THE FEDERAL TORT CLAIMS ACT TO SUITS FOR CONTRIBUTION BY JOINT OR CONCURRENT TORTFEASORS

If, as we have urged, there is no jurisdiction under the Federal Tort Claims Act for the joinder of the United States by or with another defendant, this conclusion alone weighs heavily against the contention that the Act authorizes suits for contribution. Since a suit for contribution necessarily involves many of the issues and much of the evidence relevant to the injured person's suit against the tortfeasor, the desirability of disposing of both suits in a single proceeding is obvious. Cf. *Jones* v. *Waterman S. S. Corp.*, 155 F. 2d 992, 997 (C. A. 3).; Amer. L. Inst., *Contribution Among*

Tortfeasors Act, Tentative Draft No. 1 (1938) pp. 28–29. Thus, while contribution may (in a number of states at least) be sought in an independent suit between tortfeasors,[9] a statutory scheme permitting contribution but barring joinder would be an incongruous invitation for a multiplication of overlapping suits.

Wholly apart from the question of joinder, however, we submit that the court below has erred in its conclusion that the United States may be sued for contribution as a joint tortfeasor. The consent necessary for such a suit is nowhere expressed in the Tort Claims Act, and to infer it would be inconsistent in important respects with the terms of the Act.

A. *As its history, its title, and its provisions make clear, the Tort Claims Act is a consent only to suit on tort claims*

The Federal Tort Claims Act was enacted in order to waive the Government's immunity to suits on tort claims. Throughout its history, the fact that this legislation related to tort claims

[9] In a few states, contribution is available between tortfeasors only when they have been sued jointly by the plaintiff and a joint judgment has been recovered against them. See 3 Moore, *Federal Practice* (2d Ed., 1948) 483–487; Gottlieb, *Contribution and Indemnity in Tort Actions against the United States*, 9 Fed. B. J. 391, 398 n. 29 (1948). In these states, a construction of the Tort Claims Act as allowing contribution but forbidding joinder would make the authorization of contribution meaningless.

was constantly reiterated. See, *e. g.*, S. Rep. No. 1196, 77th Cong., 2d Sess., pp. 1, 4, 5, 7; H. R. Rep. No. 2245, 77th Cong., 2d Sess., pp. 1, 5, 7, 10; H. Rep. No. 1287, 79th Cong., 1st Sess., pp. 1, 3, 5; S. Rep. No. 1400, 79th Cong., 2d Sess., pp. 29, 31. Predecessor bills were described as being designed "to extend to claimants against the Government *for torts of negligence* the same right to a day in court which claimants now enjoy in fields such as breach of contract, patent infringement, or admiralty claims" (S. Rep. 1196, *supra,* at p. 5.); "to waive a part of the governmental immunity to *suit in tort* and to permit *suits on tort claims*" (H. Rep. 2245, *supra,* p. 5; H. Rep. 1287, *supra,* p. 1); to abolish the "existing exemption [of the Government from suit] in respect to *common law torts*" (H. Rep. No. 2245, *supra,* p. 7). [Italics added in foregoing quotations.]

With this purpose in view, Congress enacted, not a statute consenting to suit on all claims somehow related to the tortious conduct of a government employee, but a "Tort Claims Act," providing in Part 2 for the "Administrative Adjustment of Tort Claims Against the United States" and in Part 3 for "Suits on Tort Claims Against the United States." When the provisions of the Act were distributed through the sections of the new Title 28, United States Code, the recurrent necessity for referring to the claims

comprehended by the Act emphasized sharply the congressional understanding that the "claims" being dealt with were tort claims. Thus, while Section 1346 (b) of Title 28 employs language substantially identical with that of Section 410 (a) of the original Act—that is, authorizes "civil actions on claims * * * for injury or loss of property," etc., without actually using the word "tort"—the remaining sections, in referring back to the claims so authorized, repeatedly employ such terms as "tort claims" or "tort claims cases." §§ 1402 (b), 1504, 2110, 2401 (b), 2672, 2674.

Concerned with "tort claims cases," Congress created the jurisdiction requisite to the adjudication of such cases, but did "not lift the immunity of the United States from tort actions except as jurisdiction [was] specifically conferred upon the district courts * * *." H. Rep. No. 1287, *supra*, p. 5. In its original form, in Section 410 (a) of the Act (60 Stat. 842, 843–844), the jurisdictional grant covered—

> any claim against the United States, for money only * * * on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would

> be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances * * *.

Changed only in phraseology, the same provisions are now contained in Title 28 of the United States Code, where they read:

> § 1346 (b) [as amended by Sec. 2 (a), Pub. L. No. 55, 81st Cong., 1st sess., April 25, 1949]. Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
>
> § 2674. *Liability of United States.*— The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the

> same extent as a private individual under like circumstances * * *.

The court below has concluded (R. 44) that "Broader phrases or words more likely to embrace liability generally are difficult to imagine." But the word "generally" in this statement is, we submit, without basis. Nor is there any support in the terms of the Act or in legal theory for the next sentence in the court's opinion which declares: "A joint tort-feasor would have a claim on account of personal injury as would a subrogee." As we shall show below (*infra*, pp. 51–53), a subrogee suing under the Tort Claims Act is simply a tort claimant standing in the shoes of his injured subrogor. A claim for contribution, on the other hand, is different from and, in vital respects, independent of the tort claim to which it relates (see pp. 37–45, *infra*). In our view, the critical error of the court below in analyzing the text of the Tort Claims Act is its failure to consider that the property damage or personal injury for (or "on account of" [10]) which

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[10] Among other changes which we believe are clearly immaterial (see *United States* v. *Aetna Surety Co.*, 338 U. S. 366, 370 n. 5), the words "on account of" were replaced by "for" when the language of Section 410 (a) was codified in Section 1346 (b) of Title 28. The stress in the opinion below (R. 44) on the phrase "on account of" would seem to be related to the court's suggestion (R. 38) that "it seems * * * possible that the language of Section 1346 (b) of revised Title 28 * * * may be somewhat narrower in effect than the pertinent portion of Section 410 (a) * * *."

the Government assumes liability is damage or injury "caused by" the negligence of a government employee. We shall show that this requirement of causality appropriately comprehends tort claims and excludes claims for contribution, which are neither in law nor in fact based upon losses "caused by" a joint tort-feasor's negligence. See pp. 32–36, *infra*.

Our position is that the language of the Tort Claims Act accomplishes the repeatedly expressed congressional purpose and no more. In order to come within the terms of this waiver of immunity, a claim must be one "on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government"—must be, in short, a tort claim. It is only with respect to such a claim that the Government consents to be liable "in the same manner, and to the same extent as a private in-

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The notes of the Revisers show, however (H. Rep. No. 308, 80th Cong., 1st Sess., p. A123), that the slight changes from Section 410 (a) to 28 U. S. C. 1346 (b), were intended as nothing more than "changes * * * in phraseology." There is no basis for supposing that, with nothing more than this laconic reference to "phraseology," Congress intended so substantial an amendment as a withdrawal of consent to suits for contribution which it considered the original Act to have granted. If anything, the purely verbal substitution of "for" in place of "on account of" simply highlights the conclusion we deem to be clearly required in any case—that the latter phrase was never intended to convey the indefinitely expansible meaning attributed to it by the court below.

dividual under like circumstances." Unless a suit for contribution is a tort claim within the waiver effected by the Tort Claims Act, the equating of the Government with a private individual respecting claims which are covered by the waiver is of no help to appellant here. See *Long* v. *United States*, 78 F. Supp. 35, 38 (S. D. Cal.). The solution to the present problem would appear to follow, therefore, from examination of the nature and incidents of respondent's claim.

B. *Suits for contribution—independent, quasi-contractual in nature, and significantly different from tort claims in their practical consequences—are not comprehended by the Tort Claims Act*

It seems clear even upon brief analysis that the claim of respondent against the United States is not a tort claim. Respondent has suffered no "loss of property or * * * personal injury * * * caused by the negligent or wrongful act or omission of any employee of the Government * * *." Respondent's liability to the injured plaintiffs is in no sense attributable to the tortious conduct of a government employee, but results from the finding that respondent's own employee was negligent.

The Government has breached no duty imposed by tort law in favor of respondent.[11] The negli-

[11] "There are many instances in which the tortious conduct of A towards B is part of a chain of causation resulting ul-

gence of either may have been a sufficient cause of the injury, in which case either would have been liable regardless of the negligence of the other. Even where this is not so, however, the fact that contributory negligence is ordinarily a bar to recovery demonstrates that one negligent tortfeasor acquires no tort claim against another. Any attempt by respondent to formulate its loss (its established liability to the injured plaintiffs) as a tort claim for a loss "caused by" the negligence of the Government's employee would prove fruitless because the negligence of respondent's own employee, already determined and necessarily averred to support a claim for contribution, contributed to that loss.[12]

Where the right of contribution exists among concurrently negligent tortfeasors, it exists as an "independent right" (*Niagara Fire Ins. Co.* v. *United States*, 76 F. Supp. 850, 855 (S. D.

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timately in liability of C to B. It does not follow, however, that A has breached any duty owed to C, or that C has any tort claim against A. For example, where a life insurer has been forced to pay insurance because of the tortious killing of the insured, the insurer acquires no claim against the tortfeasor. *Insurance Co.* v. *Brame*, 95 U. S. 754; cf. *The Federal No. 2*, 21 F. 2d 313 (C. A. 2). This is so because the completion of the insurer's contract obligation is not regarded as a proximate consequence of the tortfeasor's conduct.

[12] Pennsylvania is one of the great majority of states in which contributory negligence is a bar to recovery. *Pessolano* v. *P. T. C.*, 349 Pa. 73; *Zlates* v. *Nasim*, 340 Pa. 157, 159.

N. Y.)), "based upon * * * the idea of equalization of burden" (*Brown Hotel Co. v. Pittsburgh Fuel Co.*, 311 Ky. 396, 401), and is "a mere debt arising from an equitable duty, having none of the elements of a tort." *Feldman* v. *Gomes*, 98 Pa. Super. 84, 87; *Drummond* v. *United States*, 78 F. Supp. 730, 731 (E. D. Va.); *Maio* v. *Fahs*, 339 Pa. 180, 189; *Parker* v. *Rodgers*, 125 Pa. Super. 48, 51–52; *Brown* v. *Haertel*, 210 Wis. 354, 358–359; Woodward, *Quasi Contracts* (1913) § 259 (5). Quasi-contractual in nature, the right of contribution is afforded as a mode of spreading the burden regardless of the fact that the injured plaintiff, who alone has a tort claim, has chosen to enforce it against less than all of those potentially liable to him.[13]

The right arises, therefore, not because the party from whom contribution is sought has breached any duty owed in tort law to the party seeking contribution, but because the contributee has paid off a liability to which both could have been subjected. That liability may, as here, be a liability in tort, or it may be a liability in contract. In either event, it is the payment which creates the right. *Adam* v. *Vacquier*, 48 F. Supp.

[13] The distinction between tort claims and claims for contribution is further illustrated by the fact that the limitation period governing the latter has been held to be, not that applicable to tort claims, but that applicable to contracts implied in law generally, ordinarily about five years. See *Harris* v. *Bader*, 326 Ill. App. 471; 13 Am. Jur. 75.

275 (W. D. Pa.); *In re Trust of Lunt*, 237 Iowa 1097; *Consolidated Coach Corp.* v. *Burge*, 245 Ky. 631, 635; *Walker* v. *Kroger Grocery & Baking Co.*, 214 Wis. 519; see *Phillips-Jones Corp.* v. *Parmley*, 302 U. S. 233, 236; *Restatement, Restitution* § 82 (1). Having paid in full an obligation for which he was liable in full, the contributee is granted the right to place a share of the burden upon the contributor who might also have been required to discharge the obligation.

Rooted in equity, and essentially the same whether the obligation to which it relates sounds in contract or tort (*Brown* v. *Haertel*, 210 Wis. 354, 359), the right of contribution has been widely commended as a mode of distributing loss among joint tortfeasors.[14] It remains, nevertheless, a right as to which Congress has not granted the consent necessary for suit against the United States. It seems safe to say that the law of every state in this country imposes upon private employers liability "on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee * * * while acting

[14] See, *e. g.*, *Bohlen, Contribution and Indemnity between Tortfeasors*, 21 Corn. L. Q. 552 (1936); Gregory, *Contribution among Joint Tortfeasors: A Defense*, 54 Harv. L. Rev. 1170 (1941); Leflar, *Contribution and Indemnity between Tortfeasors*, 81 U. Pa. L. Rev. 130 (1932). But cf. James, *Contribution among Joint Tortfeasors: A Pragmatic Criticism*, 54 Harv. L. Rev. 1156 (1941).

within the scope of his * * * employment * * *." Yet the overwhelming majority of those states, in the absence of statute, deny any right of contribution among joint tortfeasors. See articles cited in note 14, *supra; Restatement, Restitution* § 102. The language we have quoted, while it correctly states an elementary principle of tort law, is not broad enough to encompass the independent, quasi-contractual right of contribution among tortfeasors. And that language is the language of the Tort Claims Act which the court below has construed as including respondent's claim. The construction is, we submit, unwarranted. Cf. 3 Moore, *Federal Practice* (2d ed., 1948) 516. Just as the Government's consent to suit on its contracts is not a consent to suit on contracts implied in law (*United States* v. *Minnesota Investment Co.*, 271 U. S. 212, 217, and cases cited), so, here, its consent to suit on tort claims is not a consent to suit on obligations implied by the law as a means of distributing loss among tortfeasors.

Apart from the obviously different judgments of policy underlying recognition of the two types of claim[18]—judgments peculiarly legislative and

[18] On this point compare the majority and dissenting opinions in *George's Radio* v. *Capital Transit Co.*, 126 F. 2d 219 (C. A. D. C.); also, compare James, *Contribution among Joint Tortfeasors: A Pragmatic Criticism*, and *Replication*, 54 Harv. L. Rev. 1156 and 1178 (1941) with Gregory, *Contribution among Joint Tortfeasors: A Defense* and *Rejoinder*, 54 Harv. L. Rev. 1170 and 1184 (1941).

far from synonymous where consent to suit against the Government is concerned—the distinction between tort claims and claims for contribution is not merely academic or historical. Because the right of contribution is distinct from that of a tortiously injured plaintiff, its enforcement against the Government would entail consequences nowhere foreseen in the Tort Claims Act. We believe that a recognition of these potential consequences lends added weight to the conclusion required by the language of the Act—that the consent it expresses does not include consent to suits for contribution.

1. As we have seen, a cause of action for contribution does not accrue until the contributee has paid more than his share of the obligation for which contribution is sought. *Supra*, pp. 34–35. Accordingly, it is well established that the statute of limitations does not begin to run against such a claim until the payment has been made. *Adam* v. *Vacquier*, 48 F. Supp. 275 (W. D. Pa.); *Harris* v. *Buder*, 326 Ill. App. 471; *In re Trust of Lunt*, 237 Iowa 1097; *Masheter* v. *Lanning*, 151 Kan. 604; *Godfrey* v. *Power Co.*, 223 N. C. 647; *Wilson* v. *Crutcher*, 176 Okla. 481; 3 Moore, *Federal Practice* (2d ed., 1948) pp. 421–422; cf. *Ainsworth* v. *Berg*, 253 Wis. 438, mandate vacated and judgment modified, 253 Wis. 445a. If the Tort Claims Act is construed to permit contribution, the Government may thus be sued some unspecified num-

ber of years after the injured plaintiff could no longer sue.[16]

But Congress, while leaving the liability of the United States to be determined in other respects according to local law, was sufficiently concerned with the avoidance of stale claims to write a uniform statute of limitations into the Tort Claims Act. Originally one year (Sec. 420 of the Act, 60 Stat. 845), now two years (28 U. S. C. 2401 (b), as amended by Section 1 of Pub. L. No. 55, 81st Congress., 1st Sess., April 25, 1949) from the time when the claim accrues, this limitation period was apparently decided upon with particular reference to the special problems of tort litigation. See Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 76th Cong., 3d Sess., on H. R. 7236, p. 21; H. Rep. No. 1754, 80th Cong., 2d Sess., p. 2. The obvious reason for the characteristically short limitation periods applied to

[16] If, as we have urged in Point I, *supra*, joinder of the United States as a third-party defendant is impermissible, most suits for contribution would probably be brought several years after the injury and after the injured plaintiff's suit would be barred by the two-year limitation of 28 U. S. C. 2401 (b) as amended by Pub. L. No. 55, 81st Cong., 1st Sess., April 25, 1949, Section 1. And even if joinder is permitted it is not compulsory; indeed, there would be many cases in which it was impossible—*e. g.*, cases brought in the state courts and cases in which compliance with the venue provision of the Tort Claims Act was impossible (see pp. 21–22 *supra*).

tort actions is the difficulty of gathering evidence any considerable period after an accident.

The problem of reconciling the statute of limitations contained in the Tort Claims Act with the asserted propriety of claims for contribution involves readily apparent difficulties. It could be suggested that the overriding purpose of Congress in limiting the time for bringing suit requires that a limitation period of two years from the time of the accident be applied to all suits, including suits for contribution. But this would mean in many cases that the claim for contribution would be extinguished before its accrual. If, on the other hand, the limitation period on a claim for contribution is held to run from the time the claim may be sued upon, the evident objective of Congress to limit sharply the period between the event causing the injury and the commencement of litigation—is thwarted. Moreover, the time elapsed between injury and suit—with which Congress was primarily concerned—would be largely determined by applicable state statutes of limitation on tort claims, and by the expedition with which tort suits were disposed of by state as well as federal courts. The important consideration here, at any rate, is that neither of the hypothetical alternatives is suggested by, or demonstrably compatible with, the Tort Claims Act. This is so, we believe, because Congress had no notion that it was consenting to suits for contri-

bution and had no occasion therefore to consider the special problems entailed by such consent. On this view, the Act's provision limiting the time for suit is simple and quite adequately phrased, reading in its present formulation (28 U. S. C. 2401 (b), as amended by Pub. L. No. 55, 81st Cong., 1st Sess., Section 1): "*A tort claim* against the United States shall be forever barred unless action is begun within two years after such claim accrues * * *."[17] [Italics added.]

2. Because the right of contribution is distinct from the injured plaintiff's right, the conclusion that the United States has consented to suits for contribution may subject the Government to liability under the Tort Claims Act in cases where it has successfully defended against the claim of the injured plaintiff. Assume, for example, an accident involving a vehicle driven by a Government employee and another vehicle driven by D, and a resulting injury to P. Assume, then, a suit by P against the Government in which the Government is held not to be liable on the ground that its employe was not negligent. Having failed to prove negligence on the part of the Government employee, P may then sue and recover from D. At this point, since the suit between P and the Gov-

[17] The Reviser's Notes to 28 U. S. C. 2401 (b) state that this subsection merely "simplifies and restates" Section 420 of the Tort Claims Act "without change of substance." H. Rep. No. 308, 80th Cong., 1st Sess., p. A185. Pub. L. No. 55 increased the time for suit from one year to two.

ernment in no way binds D, he may now seek contribution from the Government, relitigating the question of the Government employee's negligence. *Canestrino* v. *Powell*, 231 N. C. 190; *Bakula* v. *Schwab*, 167 Wis. 546; see *Yellow Cab Co. of D. C.* v. *Janson*, 179 F. 2d 54, 55 (C. A. D. C.); *Warren* v. *Boston & Maine Railroad*, 163 Mass. 484, 485–486; Gregory, *Contribution Among Tortfeasors: A Uniform Practice*, 1938 Wis. L. Rev. 365, 386.

This same possibility now exists, of course, for a private tortfeasor. It points up sharply, however, the difference between tort claims and claims for contribution. It compels the recognition that, if the Tort Claims Act be construed as permitting suits for contribution, the Government may successfully defend a claim "on account of damage to or loss of property or on account of personal injury or death" only to be held liable to a tortfeasor who has been held answerable for the injured party's loss. We believe that a fair reading of the Tort Claims Act and its history affords no basis for the conclusion that Congress—wholly preoccupied with provision of a forum for the adjudication of tort claims against the Government—was prepared to assume this additional liability.

3. Congress provided in Section 403 (d) of the Tort Claims Act (60 Stat. 843, now 28 U. S. C. 2672) that the acceptance by a claimant of an

administrative award or a compromise or settlement of his claim by the Attorney General should

> constitute a complete release by the claimant of any claim against the United States and against the employee of the Government whose act or omission gave rise to the claim, by reason of the same subject matter.

If it were held, however, that suits for contribution are maintainable under the Act, the Government would still be liable in many jurisdictions for the payment of an additional judgment after securing a release from the injured person. Ark. Stat. Ann. (1947), sec. 34–1005; Haw. Rev. Laws (1945), sec. 10491; Md. Ann. Code (1947 Cum. Supp.), Art. 50, sec. 25; N. M. Stat. Ann. (1949 Cum. Supp.), sec. 21–122; R. I. Laws 1940, c. 940, sec. 5; S. D. Laws 1945, c. 167, sec. 5; cf. *LaLone* v. *Carlin*, 139 Misc. 553, 247 N. Y. Supp. 665; *Blauvelt* v. *Village of Nyack*, 141 Misc. 730, 252 N. Y. Supp. 746. The foregoing statutes all enact Section 5 of the Uniform Contribution Among Tortfeasors Act, which provides:

> A release by the injured person of one joint tortfeasor does not relieve him from liability to make contribution to another joint tortfeasor unless the release is given before the right of the other tortfeasor to secure a money judgment for contribution has accrued, and provides for a reduction, to the extent of the pro rata share of the released tortfeasor, of the injured person's

damages recoverable against all the other tortfeasors.

This possibility of additional recovery by a concurrent tortfeasor after settlement with the injured person [18] was, we submit, wholly unforeseen and unintended by Congress when it made provision for the settlement and compromise of tort claims. Referring to the provision for administrative awards in predecessor bill (S. 2221, 77th Cong., 2d Sess.), the House Committee on the Judiciary said (H. Rep. No. 2245, 77th Cong., 2d Sess., p. 9): "Acceptance of the award by the claimant will release both the Government and the employee from liability." Referring to the provisions for administrative award, compromise or settlement in the bill as it was finally enacted, Senate Report No. 1400, 79th Cong., 2d Sess., declared (at p. 32): "The acceptance of any award, compromise, or settlement releases both the Government and the employee from liability." Practically identical language had appeared in earlier reports on predecessor bills, H. Rep. No. 2245, 77th Cong., 2d Sess., p. 9; H. Rep. No. 1287, 79th Cong., 1st Sess., p. 4. These ex-

[18] It may well be that the result achieved by Section 5 of the Uniform Contribution Act might not obtain in other jurisdictions where a right to contribution is recognized but the Uniform Act is not in effect. See, *e. g.*, *McKenna* v. *Austin*, 134 F. 2d 659, 665 (C. A. D. C.). However, the question now before this Court can be decided correctly only by reference to the varying incidents of the right of contribution as it exists according to the local laws of the several states.

pressions, we believe, mean what they say, and what the statute as enacted clearly intends—that settlements with tort claimants should release "the Government * * * from liability." Congress appropriately believed that releases would have this effect because it intended that only tort claims would be maintainable under the Act. And so the statute says, simply, that a settlement "shall constitute a complete release of *any* claim against the United States and against the employee of the government whose act or omission gave rise to *the* claim, by reason of the same subject matter." 28 U. S. C. 2672 (italics added). This language contemplates a single claim, the claim of an injured tort claimant, and no other; it intends the satisfaction of such a claim to end *any* right of suit relating to the same "act or omission" of a government employee. To permit the assertion against the United States of the additional, independent right to contribution would be flatly inconsistent with this clear intention.

4. Under Point I we have discussed the problem presented by the fact that the Tort Claims Act provides for nonjury trial while private litigation commonly involves a jury. Pp. 16–19, *supra*. There we noted the dilemma presented by the situation where a party seeking contribution from the United States has been found liable to the injured party by a jury. To follow the

ordinary rule and hold this finding conclusive against the United States would be to determine an essential element of the suit for contribution by a jury verdict, a procedure forbidden by the Act. To relitigate the question would make possible the odd result of denying contribution, on the ground that he was not liable, to a party who has been forced to pay a judgment. We repeat this point here because, in addition to illustrating the unfeasibility of joinder under the Tort Claims Act, it helps to demonstrate the Act's inconsistency with claims for contribution, whether presented by third-party complaints or independent suits.

C. *The inclusion, and subsequent abandonment, of provisions in earlier bills for pro rata liability of the United States does not warrant the conclusion that suits for contribution were authorized by the Act*

More than four years before passage of the Tort Claims Act, some of the many predecessor bills contained provisions limiting the liability of the United States to a pro rata share where other parties were also liable for the injuries. It has been suggested that these provisions, together with a statement in a report of the House Judiciary Committee when it dropped such a provision from S. 2221, 77th Cong., 2d Sess., show a congressional intent to permit suits against the United States for contribution. See

Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation,* 35 Geo. L. J. 1, 27–29 (1946). Upon analysis, however, the insubstantiality of this suggestion becomes apparent.

Typical of the predecessor provisions in question was Section 306 of S. 2690, 76th Cong., 1st Sess., which read:

> If the damage, loss, injury, or death is caused under circumstances creating a legal liability on the part of some person other than an officer, agent, or employee of the Government or upon some corporation, State, or political subdivision, to pay damages therefor, jointly with the United States, then, and in that event, the recovery against the United States shall be only for the pro rata share of the damages in proportion to the number of parties, so jointly or severally liable.

Similar provisions appeared in later bills. H. R. 7236, 76th Cong., 1st Sess., sec. 306; H. R. 6463, 77th Cong., 2d Sess., sec. 403; S. 2221, 77th Cong., 2d Sess., sec. 403. When the last of these bills, S. 2221, emerged from the House Committee on the Judiciary, the section in question had been dropped. The Committee included the following explanation of this action in its report (H. Rep. No. 2245, 77th Cong., 2d Sess., p. 12):

> Section 403 of the Senate bill provided for proportionate liability of the United States where a Government employee was a joint tortfeasor with someone else. This

> provision is not contained in the recommended bill and in cases involving joint tortfeasors the rights and liabilities of the United States will be determined by the local law. However, as stated above, no person may be joined with the United States as a defendant.

In analyzing this fragment of a long legislative history, it is important to assess with some care the meaning of the provision for pro rata liability which was being deleted when the foregoing statement by the House Judiciary Committee was made.[19] The provision is so formulated as to seek but a single objective: to insure that the liability of the United States would be limited where other tortfeasors were involved. The language is such that it would have operated directly against the tort claimant, flatly limiting "the award or judgment against the United States * * * [to] only * * * the pro rata share of the damages in proportion to the number of parties so jointly or severally liable." It neither contemplated nor required suits by

[19] Section 403 of S. 2221, substantially identical with section 306 of S. 2690 (quoted *supra*, p. 46), read as follows:

"If the damage, loss, injury or death with respect to which a claim is made pursuant to this Act is caused under circumstances creating a legal liability on the part of some person other than an employee of the Government to pay damages therefor, jointly or severally with the United States, the award or judgment against the United States shall be only for the pro rata share of the damages in proportion to the number of parties so jointly or severally liable."

or against the United States for contribution, but limited recovery from the United States without the need for such suits. There is nothing in the section to indicate that the United States was to pay in full for injuries to tort claimants and then seek contribution from joint tortfeasors.[20] Instead, it was "the award or judgment against the United States" which was limited in the first instance.

Conversely, there is no substance in the contention that the abandoned provisions for pro rata liability purported to enlarge the jurisdiction created elsewhere in the bills by authorizing suits against the United States for contribution. Having limited the liability of the United States to the tort claimant where other tortfeasors shared responsibility for his injury, these provisions achieved their purpose. They did not take the further step of inviting—without regard to local law (see note 20, *supra*)—liability for contribution.

The statement of the House Committee, quoted above, that

> * * * in cases involving joint tortfeasors the rights and liabilities of the United States will be determined by the local law * * *

[20] It may be noted that any such supposed meaning, nowhere discoverable in the language of the section, would presumably have been applicable in states which recognize no right of contribution among joint tortfeasors.

is similarly devoid of support for the decision below. Read in isolation it might perhaps be construed to show that, at the time of the Report, over four years before enactment of the Tort Claims Act (H. Rep. No. 2245, 77th Cong., 2d Sess., was dated June 16, 1942), the House Judiciary Committee envisioned suits against the United States for contribution. We believe, however, that, when the statement is read as a whole (*supra*, p. 46) and in its context, such an interpretation becomes highly speculative at best and is of little weight in any case.

First, as we have shown, the provision which the House Committee was eliminating when it wrote the foregoing explanation was concerned, not with suits by or against the United States for contribution, but with a limitation upon the liability of the United States. The attention of the Committee was presumably directed at the time to that relatively narrow problem and not to the far more complex question whether and how suits for contribution might be maintained against the United States. In this connection, it is significant that Section 301 of S. 2221, the bill to which the last-quoted statement referred, limited recovery on the claims it would have authorized to $7,500. If the language quoted from the House Report had intended that suits for contribution could be maintained against the United States and "be determined by the local law," cases would

undoubtedly have been foreseen in which a party seeking contribution had paid a judgment far exceeding $15,000 and would therefore be entitled to more than $7,500 by way of contribution. But the Report makes no comment upon this obvious possibility. We suggest that the absence of any discussion of this or other problems we have mentioned is probably explained by the fact that the Committee was not thinking of contribution at all.

Secondly, in the very sentence following the reference to local law as governing "cases involving joint tortfeasors," the Committee repeated the frequently expressed insistance that no joinder of the United States with other defendants was to be permitted. If the Committee had in mind that it had just sanctioned suits for contribution, this would have been a pointlessly troublesome addendum. As we have shown (*supra,* pp. 25–26), the requirement that contribution suits be maintained as separate actions would have necessitated multiple litigation growing out of single transactions. Such a requirement, if it was intended, would necessarily have led to added expense and the embarrassment of inconsistent judgments. Presumably some more adequate explanation than the few words under discussion would have been forthcoming if this situation had been envisaged.

Finally, and most importantly, we think the House Committee's statement, never concurred in

by the Senate and never repeated in the voluminous history of the Tort Claims Act, could not, however interpreted, outweigh the language and scheme of the Act as actually written. As we have sought to demonstrate (*supra*, pp. 26–32), the language of the Act cannot fairly be read as consenting to suits for contribution, and contains no such ambiguity on this point as would justify decision on the basis of a single committee statement which is itself ambiguous. Cf. *Packard Co.* v. *Labor Board*, 330 U. S. 485, 492; *Gemsco, Inc.* v. *Walling*, 324 U. S. 244, 260. This is especially true here where the resulting construction would lead to complications and inconsistencies which are clearly seen upon examination of the Act itself, to have been unintended. See pp. 37–45, *supra*.

D. *The fact that suits by subrogees are permitted under the Tort Claims Act affords no basis for the decision below*

The court below (R. 44) finds support for its conclusion that the United States is liable for contribution under the Tort Claims Act in this Court's decision in *United States* v. *Aetna Surety Co.*, 338 U. S. 366, holding that the Act authorizes suits by subrogees. But analysis of the nature of a subrogee's right makes clear that the rule in the *Aetna* case is inapposite here.

A subrogee acquires the claim of his subrogor and nothing more. *United States* v. *Munsey*

Trust Co., 332 U. S. 234, 242; *United States* v. *American Tobacco Co.*, 166 U. S. 468, 474. Thus, the subrogee who sues under the Tort Claims Act sues precisely on the tort claim of his subrogor from whom the claim has been acquired. "Equitable subrogation is the enforcement of the original claim. It is not a separate claim; it is still the injured person's claim although enforced by another." *Insurance Co. of North America* v. *United States*, 76 F. Supp. 951, 953 (E. D. Va.); *Niagara Fire Ins. Co.* v. *United States*, 76 F. Supp. 850, 854, 855 (S. D. N. Y.). Because the subrogee stands in the shoes of his subrogor, a release by the subrogor bars suit by the subrogee. *Pacific Fire Ins. Co.* v. *Pennsylvania Sugar Co.*, 72 F. 2d 958 (C. A. 3), certiorari denied, 293 U. S. 623; *Seeder* v. *Zoros*, 315 Ill. App. 60; *Platt* v. *Richmond, Y. R. & C. R. R. Co.*, 108 N. Y. 358. As we have seen (*supra*, pp. 42–43), a release from the injured person does not afford the same protection against a suit for contribution. A judgment against the subrogor would bar suit by a subrogee, who sues only on whatever right the subrogor might have had (cf. *Smith* v. *Kernochen*, 7 How. 198; *Westgate* v. *Maryland Casualty Co.*, 147 F. 2d 177 (C. A. 6)), but a judgment against the injured person may leave a defendant still potentially liable in a suit for contribution. *Supra*, pp. 40–41. Where the statute of limitations has run against the claim of a

subrogor, this defense is available against the subrogee. *Brown* v. *Nelms*, 86 Ark. 368; *Maryland Casualty Co.* v. *Ladd*, 121 Kan. 659; *Garland* v. *Arrowood*, 172 N. C. 591; cf. *Chapman* v. *Griffth-Consumers Co.*, 107 F. 2d 263 (C. A. D. C.). But the independent right of contribution, which accrues only upon payment of more than a pro rata share of the liability for which contribution is sought, may only arise, and continues to subsist, long after the injured person's claim is barred. *Supra*, pp. 37–38. Cf. *The Conemaugh*, 135 Fed. 240 (N. D. Ill.); *Foster & Glassell Co.* v. *Knight Bros.*, 152 La. 596.

These substantial distinctions demonstrate why the decision to enforce tort claims in the hands of subrogees does not support the contention that the consent announced in the Tort Claims Act includes consent to suit on claims for contribution. They point up the propriety of Judge Medina's statement in *Niagara Fire Ins. Co.* v. *United States*, *supra*, at 855, that, while subrogees could sue under the Tort Claims Act, a wholly different situation is presented where a joint tortfeasor seeks to assert the "independent right" of contribution against the United States.

E. Decision under the Suits in Admiralty Act are irrelevant here.

The Suits in Admiralty Act (41 Stat. 525, 46 U. S. C. 741 *et seq.*) consents to libels *in personam* against the Government in all "cases where if

such vessel were privately owned or operated, * * * a proceeding in admiralty could be maintained * * *." 41 Stat. 525, 46 U. S. C. 742. This sweeping waiver includes "all maritime claims arising out of the possession or operation of merchant vessels of the United States." *Fleet Corporation* v. *Rosenberg Bros.*, 276 U. S. 202, 213. The Public Vessels Act (43 Stat. 1112, 46 U. S. C. 781 *et seq.*), consenting to libels "for damages caused by a public vessel of the United States" (43 Stat. 1112, 46 U. S. C. 781), incorporates the provisions of the Suits in Admiralty Act "insofar as the same are not inconsistent" (43 Stat. 1112, 46 U. S. C. 782). These statutes are not by their terms limited to either contract claims or tort claims or any other such category. See, *e. g.*, *Johnson* v. *Fleet Corporation*, 280 U. S. 320; *Eastern Transp. Co.* v. *United States*, 272 U. S. 675; *United States* v. *Loyola*, 161 F. 2d 126 (C. A. 9); *United States* v. *Caffey*, 141 F. 2d 69, 70 (C. A. 2), certiorari denied, 323 U. S. 750. Instead, they give authority "to sue generally 'in admiralty' * * *" (*Canadian Aviator, Ltd.* v. *United States*, 324 U. S. 215, 227) and consequently "impose on the United States the same liability (apart from seizure or arrest under a libel *in rem*) as is imposed by the admiralty law on the private shipowner * * *." *Id.* at 228.

Since the United States has exposed itself to liability for any kind of admiralty claim, and since the right to contribution "belongs to the substantive law of the admiralty" (*The Ira M. Hedges*, 218 U. S. 264, 270), there is nothing startling in the rule that the United States may be sued for contribution in admiralty. At the same time, there is nothing in this rule which supports the view that an Act consenting to suit on tort claims--and not on civil claims generally—permits suits for contribution.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments below should be reversed.

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APPENDIX

1. The Federal Tort Claims Act (60 Stat. 842), as originally enacted (see note 1, *supra*, p. 2), provided in pertinent part as follows:

> SEC. 403. (a) Subject to the limitations of this title, authority is hereby conferred upon the head of each Federal agency, or his designee for the purpose, acting on behalf of the United States, to consider, ascertain, adjust, determine, and settle any claim against the United States for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death, where the total amount of the claim does not exceed $1,000, caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death, in accordance with the law of the place where the act or omission occurred.
>
> (b) Subject to the provisions of part 3 of this title, any such award or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud, notwithstanding any other provision of law to the contrary.
>
> (c) Any award made to any claimant pursuant to this section, and any award, compromise, or settlement of any claim cognizable under this title made by the

Attorney General pursuant to section 413, shall be paid by the head of the Federal agency concerned out of appropriations that may be made therefor, which appropriations are hereby authorized.

(d) The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release by the claimant of any claim against the United States and against the employee of the Government whose act or omission gave rise to the claim, by reason of the same subject matter.

* * * * *

SEC. 410. (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claim-

ants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees.

* * * * *

SEC. 411. In actions under this part, the forms of process, writs, pleadings, and motions, and the practice and procedure, shall be in accordance with the rules promulgated by the Supreme Court pursuant to the Act of June 19, 1934 (48 Stat. 1064); and the same provisions for counterclaim and set-off, for interest upon judgments, and for payment of judgments, shall be applicable as in cases brought in the United States district courts under the Act of March 3, 1887 (24 Stat. 505).

SEC. 412. (a) Final judgments in the district courts in cases under this part shall be subject to review by appeal—

(1) in the circuit courts of appeals in the same manner and to the same extent as other judgments of the district courts; or

(2) in the Court of Claims of the United States: *Provided,* That the notice of appeal filed in the district court under rule 73 of the Rules of Civil Procedure shall have affixed thereto the written consent on behalf of all the appellees that the appeal be taken to the Court of Claims of the United States. Such appeals to the Court of Claims of the United States shall be taken within three months after the entry of the judgment of

the district court, and shall be governed by the rules relating to appeals from a district court to a circuit court of appeals adopted by the Supreme Court pursuant to the Act of June 19, 1934 (48 Stat. 1064). In such appeals the Court of Claims of the United States shall have the same powers and duties as those conferred on a circuit court of appeals in respect to appeals under section 4 of the Act of February 13, 1925 (43 Stat. 939).

* * * * *

SEC. 420. Every claim against the United States cognizable under this title shall be forever barred, unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, it is presented in writing to the Federal agency out of whose activities it arises, if such claim is for a sum not exceeding $1,000; or unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, an action is begun pursuant to part 3 of this title. In the event that a claim for a sum not exceeding $1,000 is presented to a Federal agency as aforesaid, the time to institute a suit pursuant to part 3 of this title shall be extended for a period of six months from the date of mailing of notice to the claimant by such Federal agency as to the final disposition of the claim or from the date of withdrawal of the claim from such Federal agency pursuant to section 410 of this title, if it would otherwise expire before the end of such period.

* * * * *

2. Rule 14 (a) of the Federal Rules of Civil Procedure provides as follows:

> Before the service of his answer a defendant may move ex parte or, after service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross claims as provided in Rule 13. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

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